Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1622

ALVIN H. WRIGHT and MARTHA WRIGHT, General Guardians and Guardians ad Litem of PAMELA JAN FELLARS, RICHARD LELAND FELLARS, NANCY KAY FELLARS and MARCUS DEWEY FELLARS, minors, and ALVIN H. WRIGHT, Executor of the Estates of RICHARD DEWEY FELLARS and NANCY JANE BARLOW FELLARS,

Plaintiffs, Appellees, and Petitioners,

v.

UNITED STATES OF AMERICA and The UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, an Agency of the United States of America,

Defendants - Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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ALVIN H. WRIGHT and MARTHA WRIGHT, General Guardians and Guardians ad Litem of PAMELA JAN FELLARS, RICHARD LELAND FELLARS, NANCY KAY FELLARS and MARCUS DEWEY FELLARS, minors, and ALVIN H. WRIGHT, Executor of the Estates of RICHARD DEWEY FELLARS and NANCY JANE BARLOW FELLARS,

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Defendants - Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Alvin H. Wright, et al, the petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals entered in the above-entitled case on December 22, 1977, which reverses the Trial Court's Judgment for petitioners, and to review the denial of petitioners' Petition for Rehearing which was denied on February 15, 1978.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 568 Fed. Reporter (2) 153 (1977), and is printed in Appendix A hereto, infra, page A-1. The Journal Entry of Judgment of Honorable Aldon J. Anderson, United States District Court for the District of Utah, filed February 19, 1976, is printed in Appendix B hereto, infra, page A-31.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals (Appendix A, infra, page A-1) was entered on December 23, 1977. A timely petition for Rehearing was filed on January 20, 1978 and denied on February 15, 1978. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254, (1).

QUESTIONS PRESENTED

1. Whether the discretionary function exception of §2680(a) exempts the United States Government from liability for negligent acts when carrying out a statute when the government agents were negligent or were not exercising due care in performance of their duties.

2. Whether the discretionary function exception of 2680(a) exempts the United States Government from liability for negligent acts when after having made a policy decision to construct a bridge, approach road, and dike, the United States Government at the operational level does the following:

(a) is negligent in the design and preparation of plans for the project.

(b) is negligent in carrying out its own plans and specifications and the construction of the project, and

(c) such negligence is found by the trial judge to be the proximate cause of death and injuries.

3. Whether the United States Government is relieved from liability on a Federal Tort Claim when it is negligent in the construction of a project when the plans are partially provided by the State of Utah and where after construction and approximately nine months later their project becomes part of the Utah State systems and the State of Utah assumes a duty of maintenance. Does such intervening duty of the state to maintain relieve the government from liability.

4. Whether the United States Government in a Federal Tort Claim proceeding is relieved from liability in a case where the government did not demonstrate that any planning-level decision dictated the design and construction of the approach road and dike and where the government omits from the subject project such things as riprap, and negligently constructs an approach road of loose materials in derrogation to their own plans and specifications.

5. Whether a resident federal judge's decision based upon law and his interpretation of the facts will be reversed when there is clear and convincing evidence adduced at trial in support of the court's findings.

6. Whether the Tenth Circuit Court of Appeals may disregard:

(a) Federal Rule 52(a) 28 U.S.C. stating that findings of a trial court will not be disturbed on appeal unless they are held to be clearly erroneous, and

(b) the mandate of prior decisions that courts of appeal must view evidence and all reasonable inferences therefrom in a light most favorable to the prevailing party.

STATUTES INVOLVED

28 U.S.C. Section 1346(b)

(b) Subject to the provisions of chapter 171 of this title (28 USCS §2671 et sep.), the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. Section 2674

The United States shall be liable to respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, . . .

28 U.S.C. Section 2680

The provisions of this chapter and Section 1346(b) of this title (28 USC §1346(b)) shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance of the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

This action was brought for the wrongful death of Richard Dewey Fellars and Nancy Jane Barlow Fellars and for injuries to Marcus Fellars, a minor, in the United States District Court for the District of Utah with undisputed jurisdiction based upon Title 28 U.S.C., §1346(b).

The government in approximately 1963 or 1964 made a planning policy decision to construct the McElmo Creek Bridge and approach road on the Navajo Reservation in the State of Utah. In the execution and implimentation of such plan, the Bureau of Indian Affairs' engineers obtained from the State of Utah incomplete plans for a bridge at that location. That said plans were modified by the Bureau of Indian Affairs and they independently prepared separate plans for the approach roads. In 1964 the bridge and approaches were constructed by the Bureau of Indian Affairs.

The alignment and profile for the bridge was determined after joint trips to the site by employees of the Bureau of Public Roads and Utah State Highway Department and were incorporated in the incomplete plans drawn by the Utah State Highway Department.

The stream bed of McElmo Creek at the site of the bridge was a broad flood plain approximately 540 feet wide with two evident stream channels, a low-water channel and a high-water channel created by the diversionary forces of certain upstream abutments in the stream channel, forcing the high flow water into the central part of the flood plain.

The approach road was so constructed that the high-waterflow channel flowed directly against the approach road and at a point where the washout occurred.

That the bridge as constructed was 154 feet long and was constructed over the low-water channel and the approach road in question as constructed blocked the central and high-flow channel and in effect dammed the high-flow channel and 386 feet of the creek channel.

That good engineering practices and standards in 1964 required that the bridge should be located, or the water diverted, so that the high-flow water would arrive at the bridge perpendicular to the long axis of the bridge or parallel to the bridge support abutments.

The approach was constructed of highly erodable, loose, finely grained material with minimal and inconsequential rock.

No riprap or other non-erodable protection were designed by the Bureau of Indian Affairs or constructed to protect the approaches from erosion contrary to good engineering practices and standards then existing.

After the project was essentially completed the project engineer realized there was a necessity and testified that he ordered a diversionary dike constructed without prior plans or specifications to divert high-flow water under the bridge, but, if constructed, it was negligently designed, constructed and of such length and height and of loose stream bed material that it could not reasonably be expected to divert a flood of any serious proportions so as to protect the approach from eroding away. Such dike was constructed without being a part of the planning policy decision or the later plans drawn by the Bureau of Indian Affairs. Had an adequate dike been constructed with appropriate erosion protection the approach would not have failed and this case would not have arisen.

The diversionary dike, as constructed, was not protected by riprap or other erosion protection to protect it from high-water flow.

The United States, although specifying that the approaches were to be constructed pursuant to Federal specifications, FP-61, failed to construct said approaches in accordance with plans drawn by the Bureau of Indian Affairs or FP-61 specifications. The side slopes of the approaches were steeper than the plans called for, increasing erosion potential, and there was no riprap or other protection on the approach road or the diversionary dike as per the specifications.

On September 4, 5, and 6, 1970, in the vicinity of the McElmo Creek Bridge, there was a slow drizzle of rain but upstream there was a rain storm of "record proportions." Experts testified that the probability of recurrence was from 15 years to 55 years but many witnesses testified that there has been 6-8 floods of similar size in McElmo Creek within a 60-year period.

There was no evidence that Richard or Nancy Fellars knew there would be a flood.

On September 5, 1970, the flood waters in the high flow or flood channel eroded the approach road and the approach road washed out at the point where the approach road crossed the high-water channel and for a distance of 60 or 70 feet. There was no adequate protective dike or other diversionary works to direct the flood water under the bridge and there was no riprap or other protection against erosion of the approach road.

That in the darkness of the evening of September 5, 1970, Richard and Nancy Fellars, parents of the minor

plaintiffs, drove off the end of the washed-out approach road into the flood waters at a point near McElmo Creek Bridge and Marcus Fellars, age 12, was later pulled from the water injured, and Richard and Nancy Fellars were drowned.

In 1965 a right of way was granted and the State of Utah incorporated the road, bridge and approaches into its state highway system.

REASONS FOR GRANTING WRIT

The evidence clearly shows that the negligence of the United States and its agencies were not step directed by a planning level policy decision, but rather were negligent acts in the execution of its policy on an operational level.

No claim is made that the government was negligent in its discretionary planning level policy decision to construct the McElmo Creek Bridge, approaches and road in general. However, once that planning level policy decision was made and the United States decided to build the approach road and bridge in question, it was no longer exercising a discretionary policy-making function and they should be required to perform the operational function of building the approach road, etc. in a non-negligent manner.

Specifically, the evidence showed the negligent acts of the United States were as follows:

1. The United States failed to recognize the physical evidence present in the flood plain at the time of construction as to the magnitude of previous floods and the physical evidence of a high-water or flood channel.

2. The United States relied upon inadequate investigation and facts which were available upon which to base its hydrological computations upon which the approach road was constructed.

3. The United States failed to comply with good engineering practice and standards existing then to either construct and position the bridge over the high-water flow or flood channel or construct an adequate dike or diversionary works to direct the water so it would pass perpendicular to the long axis of the bridge or parallel to the bridge support abutments.

4. The United States failed to construct adequate riprap or other protective works to protect the approach or diversionary dike from erosion by flood water in accordance with the specifications of FP-61.

5. The United States failed to construct the approach roads in accordance with the plans prepared by the Bureau of Indian Affairs which created increased erosion of the approach material.

6. The United States failed to construct an adequate diversionary dike.

7. That the United States constructed the McElmo Creek Bridge and approaches without reasonable concern for the hazards that would be created during floods and such negligent conduct was the proximate cause of the deaths of Richard and Nancy Fellars and the damages to the petitioners.

The Tenth Circuit Court's Majority opinion expansively interprets *Dalehite v. United States,* 463 U.S. 15 (1953) so that it is hard to imagine an independent similar act by an engineer or other government employee which

would not be immunized from the possibility of relief under the act as a discretionary function under Title 28 U.S.C. Section 2680(a). Judge Holloway in his dissent to the Tenth Circuit Court Majority opinion said, "To apply the exception as broadly as the majority opinion does here is to allow the exception to swallow up the act."

Under the Dalehite test the discretionary function exception includes "determinations made by executives or administrators in establishing plans, specifications or schedules of operations," Id. at 36 (Emphasis added.)

Other well-reasoned decisions in interpreting the discretionary function exception have held that for such exception to apply the acts in question must be steps directed by a planning-level policy decisions. See *Seaboard Coast Line R.R. v. United States*, 473 F.2d 714, 716 (5th Circuit); *Driscoll v. United States*, 525 F.2d 136, 138 (9th Circuit). Compare *Boyce v. United States*, 93 F.Supp. 866, 868-69 (S.D. Iowa.)

In Dalehite the court declared that "Each of the acts issued upon as negligence was directed by this plan" and thus the court applied the discretionary exception of 28 U.S.C. 2680(a) and relieved the government of liability. The instant case involves a decision to build a diversionary dike that was made on the site by the BIA Engineer who supervised the actual construction and was not directed by any "plan" formulated by such agency or the government.

Also in this case there was no record evidence that a federal planning level policy decision was handed down which directed doing the acts which the government did negligently. The burden was on the government to establish such elements of the exception. *Boyce v. United States*, 93 F.Supp. at 868.

The decision of the court is contrary to other 10th Circuit Court and other Circuit Court decisions. See *Foster v. United States*, 183 F. Supp. 524, 527-28 (D. NM) affirmed on other grounds, 280 F.2d 431 (10th Cir.). *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir.); *Smith v. United States*, 546 F.2d 872 at 876-77 (10th Cir.); *Griffin v. United States*, 500 F.2d 1059, (3rd Cir.); *Seaboard Coast Line R.R. v. United States*, 473 F.2d 714, 716 (5th Cir.); *Indian Towing Co. v. United States*, 350 US 61, 68; *Bryant v. United States*, F.2d (10th Cir., 11/11/77) and *Jackson v. Kelley*, 557 F.2d 735, 738 (10th Cir.) a unanimous en banc opinion which expressly approved *Seaboard*.

The question of the applicability of the rule of non-liability of independent contractors was presented at great length to the trial judge. The trial judge rejected the argument that the non-liability rule applies and held that the State of Utah's acceptance and maintenance of the highway system did not constitute independent, intervening causes which would break the chain of causation between the negligent acts of the United States Government's agents and the deaths and injuries suffered by the Plaintiffs. The rule most prevalent in recent cases is stated as follows:

> ". . . (A)n independent contractor may be found to be liable to third parties who may have been foreseeably endangered by the contractor's negligence, even after acceptance of the work. The above must be limited to the extent that the contractor should not be liable if he merely carefully carried out the plans, specifications and directions given him, at least where the plans are not so obviously dangerous that no reasonable man would follow them and further be limited to the extent that if the owner discovers the danger, or it is obvious to him, his responsibility supersedes that

of the contractor. See *Prosser*, Torts 2d Ed. Section 85 at 519 and *Russell v. Arthur Whitcomb, Inc.*, 1956, 100 N.H. 171, 121 A.2d 781. . . ."

See *Baker v. Fryar*, 1966 New Mexico, 421 P.2d at 786-87.

The trial court in the instant case noted that there are exceptions to the rule of non-liability after acceptance of an independent contractor's work, the Utah Supreme Court in *Leininger v. Stearns*, 404 P.2d 36, noted that each case must be decided on its own facts.

When such a determination is made on the law of his State by a resident federal trial judge, his views are persuasive and are ordinarily accepted. *Sade v. Northern Natural Gas Co.*, 483 F.2d 230, 234, (10th Cir.); *Teague v. Grand River Dam Authority*, 425 F.2d 130, 134 (10th Cir.); *Parsons v. Amerada Hess Corp.*, 422 F.2d 610, 614 (10th Cir.) (a case involving the liability of independent contractors); *Bartch v. United States*, 330 F.2d 466, 467 (10th Cir.) (a decision under the Federal Tort Claims Act.) A similar rule of deference is applied by the Supreme Court. See *Bishop v. Wood*, 426 U.S. 341, 346-47 n. 10; *Propper v. Clark*, 337 U.S. 472, 486-87.

That the reasons for granting the writ of certiorari are summarized as follows:

1 That the Tenth Circuit Court of Appeals in reversing the trial court has unwarrantedly expanded the discretionary function exception to Federal Tort Claims Act and such action is clearly in derrogation and opposition to prior decisions announced by the United States Supreme Court, other circuit courts of appeal, and its own circuit pronouncements of the law within its jurisdiction and therefore there is a substantial federal question involved over which the Supreme Court of the United States should grant certiorari and settle this matter.

2. That the Tenth Circuit Court of Appeals has decided an important Utah State question of law in a way that is in conflict with the applicable law of the State of Utah.

(a) That the Tenth Circuit Court of Appeals has announced a new standard of care in holding that state approval sets the standard of care which insulates the government from liability for negligence in design and building federal roads and dikes.

(b) That such holding is not in conformity with Utah law nor federal law and the Tenth Circuit Court of Appeals is legislating new law rather than constructing well reasoned prior state and federal law.

3. That the Tenth Circuit Court of Appeals has so far departed from the applicable law and usual course of judicial proceeding as to call for an exercise of the power of supervision of the Supreme Court.

(a) That the Tenth Circuit Court of Appeals' decision reversing the trial court's decision decides a federal question in conflict with applicable decisions by the Tenth Circuit Court of Appeals, other circuit courts of appeal and applicable decisions of the Supreme Court.

(b) That there exists a substantial controversy between the Tenth Circuit and the Supreme Court decisions and other circuit courts which have ruled on this matter and the United States Supreme Court should grant certiorari to determine the issues here involved because of the substantial conflict of interpretation of law by the various circuit courts of appeal.

(c) The trial court made a determination that the

non-liability rule of 28 USC 2680(a), discretionary function exception, did not apply and the State of Utah's acceptance and maintenance of the project (highway system) did not constitute independent, intervening causes which would break the chain of causation between the negligent acts of defendant's agents and the deaths and injuries sustained by plaintiffs. That the Circuit Court in overruling the federal trial judge clearly acted contrary to the well settled and general rule that when a determination is made on the law of his state by a resident federal trial judge, his views are persuasive and ordinarily accepted.

(d) The Tenth Circuit Court of Appeals has clearly disregarded the record evidence and a finding of the trial court which is clearly supported by competent evidence and has erroneously overruled the trial judge in complete derrogation of proper findings of fact supported by the record and in derrogation to previously announced decisions of the Supreme Court and Circuit Courts of Appeal, and Federal Rule 52(a), 28 U.S.C. which states that findings of a trial court will not be disturbed on appeal unless they are held to be clearly erroneous.

(e) That the findings of the trial court were not clearly erroneous but on the contrary were well reasoned and supported the weight of the evidence.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1497

ALVIN H. WRIGHT, et al., *Plaintiffs-Appellees*

vs.

UNITED STATES OF AMERICA, et al., *Defendants-Appellants*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. C-22-73)

Submitted: August 3, 1977

William S. Andrews of Andrews, Marenda and Moseley, Phoenix, Arizona, (C. R. Henriksen and D. Clayton Fairbourn, Salt Lake City, Utah, on the brief) for Plaintiffs-Appellees.

Donald Etra, Civil Division, Appellate Section, Department of Justice, Washington, D.C., (Rex E. Lee, Assistant Attorney General, Salt Lake City, Utah, Ramon M. Child, United States Attorney, Salt Lake City, Utah, and Ronald R. Glancz, Civil Division, Appellate Section, Department of Justice, Washington, D.C., on the brief) for Defendants-Appellants.

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge

Appellant, United States, seeks review of an adverse judgment following trial to the court in a wrongful death

action brought under the Federal Tort Claims Act (28 U.S.C.A. §1346). Such actions may be maintained against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

In the early 1960's the State of Utah Highway Department initiated plans for the construction of a bridge on Highway 262 over McElmo Creek in San Juan County, Utah. Thereafter, due to a lack of funds on the part of the State, the Bureau of Indian Affairs (BIA) of the Department of the Interior was asked to help with the construction of the bridge. In 1964, utilizing Utah's designs for the bridge, and its own designs for the approach roads, the BIA built the bridge, with the State of Utah controlling and deciding upon its location and placement. Upon completion of the bridge and the approaches, and the final paving by the State of Utah, the bridge and approaches were accepted into the highway system for the State of Utah in 1965. Utah, at that time, assumed full and sole responsibility for maintaining the bridge and approach roads.

Five years later commencing September 4, 1970, and continuing through September 5, 1970, a rainfall of record proportion in the area of the bridge precipitated flooding, which caused portions of the approach roads to the bridge to be washed away. On September 5, 1970, Richard and Nancy Fellars were killed when, apparently unable to traverse the washed out approach road, their car went out of control and into McElmo Creek.

Plaintiffs, guardians of the Fellars' children and executor of their estates, brought this action alleging, *inter*

alia, that the defendant, United States, by and through its agents, had "negligently designed, placed, located, constructed, inspected and managed the McElmo Creek Bridge and its approaches and that as a result of the aforesaid negligence the Fellars were wrongfully killed. United States denied negligence and argued that the accident was caused by the Fellars' own negligence, that the Fellars assumed the risk of the accident in question, that the accident resulted from unforseen extraordinary natural forces, and that the accident was unavoidable.

At trial each side presented numerous witnesses relative to the design, construction, and location of the bridge and the approach roads, a diversionary works placed upstream from the bridge and approaches, and the size and nature of the storm which precipitated the Fellars' accident. The testimony alone encompasses over 1,000 pages of the record on appeal. After all the evidence was submitted, the trial court found the United States negligent and awarded plaintiffs damages totaling $230,400. In so doing, the trial court found, *inter alia*, that the bridge and approaches thereto were negligently designed and constructed without adequate or reasonable concern for hazards that would be created during floods, that the approaches were improperly constructed of finely grained material inadequate to prevent erosion by flood materials, that the diversionary works were poorly designed and constructed and not adequately maintained, that a reasonably prudent engineer would not have placed the bridge over the low flow channel but would have located the bridge so as to cross over the flood channel, that the defendants' negligence was the proximate cause of the flood breaking through the approach road, that there was no credible evidence to indicate that the Fellars were negligent, that having opted to construct the bridge and approach roads the

defendants were chargeable with performing same in a non-negligent manner, and that the State of Utah's acceptance and maintenance of the bridge and the approaches "did not constitute independent, intervening causes which would break the chain of causation between the negligent acts of defendants' agent and the deaths of the Fellars."

On appeal United States contends that: (1) the trial court was clearly erroneous in finding it negligent; (2) the September 4-5, 1970, flood was an act of God which relieved it of any liability; (3) the subsequent acceptance and maintenance of the bridge and approaches by the State of Utah relieved it of any liability; (4) the liability of the United States is barred by the "discretionary function" exception to the Federal Tort Claims Act; and (5) 33 U.S.C. §702(c) immunizes it from any liability caused by floods. Because of their dispositive nature, only issues (1), (3) and (4) will be discussed.

I.

United States contends that the trial court was clearly erroneous in finding it negligent. Under Fed. R. Civ. Proc. rule 52(a), 28 U.S.C.A., findings of a trial court will not be disturbed on appeal unless they are held to be clearly erroneous. *Volis v. Puritan Life Insurance Company,* 548 F.2d 895 (10th Cir. 1977); *Joyce v. Davis,* 539 F.2d 1262 (10th Cir. 1976). Courts of appeals must view evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party. *Joyce v. Davis, supra; Hart v. Western Investment and Development Company,* 417 F.2d. 1296 (10th Cir. 1969). Findings of a trial court are, necessarily, presumed correct and will not be reversed unless they are clearly erroneous. *Quarles v. Fuqua Industries, Inc.,* 504 F.2d. 1358 (10th Cir. 1974). Applying these standards to the facts of the case at bar, and ever mindful

that appellant courts cannot try cases *de novo, Ahern v. Veterans Administration,* 537 F.2d. 1098 (10th Cir. 1976), we hold that the trial court was clearly erroneous in finding the United States negligent.

David Sargent, Chief Structural Engineer for the State of Utah Highway Department at the time of the accident, testified that:

> Q. Did you have ultimate responsibility for the design of the bridge?
>
> A. I had ultimate responsibility.
>
> [R., Vol. IV, p. 617.]

Sargent further testified that Utah not only designed the bridge but it also controlled the location and the placement of the bridge:

> Q. Now, you're familiar with what we've been referring to as a high flow channel?
>
> A. Yes.
>
> Q. Was there any discussion of placing the bridge over that channel?
>
> A. There very likely was. I do not recall any specific discussion.
>
> Q. Who had the ultimate decision in determining the placement of the McElmo Creek bridge?
>
> A. As a chief structural egineer, I would have to assume that responsibility.
>
> [R., Vol. IV, p. 629.]

The bridge was designed by the State of Utah to withstand a flood of a calculated magnitude that would occur only once every 25 years. Ward Morby, hydraulic engineer for the State of Utah at the time of the accident, testified that:

Q. Did you perform a hydraulic design with respect to the McElmo Creek bridge?

A. Yes.

Q. Was that design prepared under your direction?

A. Yes, it was.

Q. What hydraulic information did you consider necessary for examination?

A. First of all, we would, of course, work out the hydrologic data. This is the place you would normally start this type of investigation.

Q. What hydrologic data did you work up?

A. We were to arrive at a design for this particular crossing that was selected for a 25-year design frequency.

Q. Why was a 25-year design frequency selected?

A. This was the design frequency that the Highway Department felt that they could justify expending their funds on for a road with the amount of traffic that the road would be subject to.

• • •

A. Well, normally they felt — and I guess this is — you have to do based on experience you have — that they would not be justified or could not economically justify spending those additional funds for a higher design frequency than 25 years.

[R., Vol. V., pp. 772-773.]

The bridge was accordingly designed for a 25-year design frequency. The evidence presented at trial was that the storm in question generated a flow of 13,100 c.f.s. Such a flow would normally occur only once every 42 or 55

years.[1] Plaintiff's own expert also acknowledged that the bridge, as designed, would withstand a 10-20,000 c.f.s. flow. Under these circumstances, and in view of the utilization of the available expert hydrological and geographical data, we cannot hold that the State of Utah was negligent in designing the bridge in the manner it did, or that the United States was negligent in utilizing such a design and placing it in the location directed by the State of Utah.

Further, in consideration of these circumstances we also hold that the BIA was not negligent in designing and construction the approach roads for the bridge, since the design of the bridge over the low flow channel required that the approach roads be placed in the flood channel. Sargent testified:

Q. Mr. Sargent, you were actually aware of the location of the high channel when you designed the bridge, were you not?

A. Yes.

Q. And yet the bridge was not placed over that high channel, was it?

A. No.

Q. Did you not make that ultimate determination not to place it over the high channel?

A. Well I've answered earlier that I'll assume that responsibility, yes, sir.

Q. Now, if the bridge were not placed there, did you know that the approaches would have to go in that high water channel?

A. Yes.

[R., Vol. IV, pp. 649-650.]

[1]One of the plaintiff's expert witnesses did testify that in his opinion a storm of the September 4-5, 1970, size would reoccur every 15 to 17 years but that also, in his opinion, there was not much hydrological data available when the bridge was designed and that a significantly larger record "would be necessary to adequately design such a project."

The design and location of the bridge dictated the location of the approach roads. Accordingly, we hold that the United States was not negligent in designing and constructing the approach roads when, (a) the plans for the approaches were approved by the district engineer for the State of Utah Highway Department, and (b) the design and construction of the approach roads were in accordance with the applicable federal specification requirements as delineated in "FP-61 — Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, January, 1961"[2], U.S. Department of Commerce, Bureau of Public Roads. It is particularly significant, we believe, that the State of Utah undertook all of the final paving for the bridge and the approaches and thereafter assumed full and sole responsibility for maintenance of the bridge and its approaches after accepting them into the state highway system.

II.

United States contends that the subsequent acceptance and maintenance of the bridge and its approaches by the State of Utah relieved it of any liability. In Federal Tort Claims Act suite of the law of the place where the alleged negligent conduct or omission occurred must be applied. *Richards v. United States,* 369 U.S. 1 (1962); 1 Barron & Holtzoff (Wright Ed.), §54 pp. 294-297; *Ahern v. Veterans Administration, supra.* The United States here may be likened, for purposes of liability, to the independent contractor in *Leininger v. Stearns-Roger Manufacturing Company,* 404 P.2d. 33 (Utah 1965). The court there opined that a contractor is not liabile for resultant injuries if he has merely carried out plans, specifications and directions gven to him by an employer, at least when the plans are

[2]The record fails to disclose that compliance with these standards gives rise to negligent construction or design.

not so obviously dangerous that no reasonable man would follow them. The court said:

> This court is familiar with the general rule as to the non-liability of an independent contractor after the acceptance of the work by the owner, as well as with the exceptions to this rule and the so-called "modern view." 13 A.L.R. 2d 195, 58 A.L.R. 2d 869. However, each case must be decided on the basis of its own facts and seldom are two cases identical.
>
> The so-called "modern view" has the effect of applying to construction contractors the landmark standard promulgated in *MacPherson v. Buick Motor Company,* 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696, but does not have the effect of making the contractor absolutely liable to third persons if the contractor was free of negligence. *An important limitation on the rule placing building contractors on the same footing as sellers of goods is that the contractor is not liable if he has merely carried out the plans, specifications and directions given him, since in that case the responsibility is assumed by the employer, at least when the plans are not so obviously dangerous that no reasonable man would follow them.* The rule, as stated in Ryan v. Feeney & Sheehan Bldg. Co., 239 N.Y. 43, 145 N.E. 321, 41 A.L.R. 1 (1924), which is the same court which earlier had decided MacPherson v. Buick, supra, is as follows:
>
> > • • • A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury.

And this rule was followed and cited approvingly by Judge Learned Hand in Person v. Cauldwell-Wingate Co., 2 Cir., 187 F.2d 832, cert. den. 341

U.S. 936, 71 S.Ct. 855, 95 L.Ed. 1364 (1951). See also: Russell v. Arthur Whitcomb, Inc., 100 N.H. 171, 121 A.2d 781; Tipton v. Clower, 67 N.M. 388, 356 P.2d 46; Trustees of the First Baptist Church of Corinth v. McElroy, 223 Miss. 327, 78 So.2d 138; Davis v. Henderlong Lumber Company, D.C., 221 F.Supp. 129 (1963). (Emphasis supplied.)

404 4P.2d, at p. 36.

We hold that under *Leininger, supra,* the United States cannot be held liable, considering all of the facts and circumstances in this record, for any accident which resulted from the design and construction of the approach roads since Utah designed and located the bridge and Utah subsequently accepted and agreed to maintain the bridge and approach roads.

III.

United States further contends that its liability is also barred by the "discretionary function" exception to the Federal Tort Claims Act under §2680 (a). We agree.

28 U.S.C.A., §2680 (a) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to —
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care in the execution of a statute or regulation, whether or not such a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

The actions of the Bureau of Indian Affairs of the Department of the Interior in aiding Utah in the construction of the bridge and approach roads were clearly actions "in the execution of a statute."

23 U.S.C.A., §208 provides *inter alia*:

> (a) Funds available for Indian reservation roads and bridges shall be used to pay for the cost of construction and improvement thereof.
>
> • • •
>
> (d) Cooperation of States, counties, or other local subdivisions may be accepted in such construction and improvement . . . .

Actions performed under statutory authorizations such as §208, *supra,* were intended to fall within the "discretionary exemption" of the Tort Claims Act. In *Dalehite v. United States,* 346 U.S. 15 (1953), the Supreme Court significantly opined:

> . . . On the other hand the Committee's reports explain the boundaries of the sovereign immunity waived, as defined by this §2680 exception, with one paragraph which appears time and again after 1942, and in the House Report of the Congress that adopted in §2680(a) the limitation in the language proposed for the 77th Congress. It was adopted by the Committee in almost the language of the Assistant Attorney General's explanation. This paragraph characterizes the general exemption as "highly important exception, *intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious. . . . The bill is not intended to authorize a suit for damages to test the validity of or provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion.* (Emphasis supplied.)

346 U.S., at pp. 28-30.

The court in *Dalehite, supra,* further expounded on the breadth of the "discretionary exception":

> It is unnecesary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act *includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.* It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. *If it were not so, the protection of* §2680 (a) *would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a casual step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.* (Emphasis supplied.)
>
> 346 U.S., at pp 35, 36

See also: *First National Bank In Aubuquerque v. United States*, 552 F.2d 370 (10th Cir. 1977).

Thus, §2680, *supra,* as interpreted in *Dalehite, supra,* and recognized by this court in *First National Bank In Albuquerque, supra,* broadly applies the "discretionary exemption" to liability under the Tort Claims Act to include not only the "initiation of programs and activities," but also "determinations made by executives or administrators in establishing plans, specificatons or schedules of operations." Applying these standards to the facts herein, we hold that the Bureau of Indian Affairs was engaged in a "discretionary function" when it determined to aid and assist the State of Utah in the construction of the bridge and approach roads as authorized under 23 U.S.C.A., §208.

In Tort Claims actions we must be mindful that the United States is liable as an individual only on the manner and to the degree to which it has consented. *United States v. Gregory,* 300 F.2d 11 (10th Cir. 1962); *Powell v. United States,* 233 F.2d 851 (10th Cir. 1956). The "discretionary function" exemption to tort liability is auxiliary to the government's ability to formulate and implement policy. It is within this frame of reference that we have previously held that the United States cannot be held liable for damages to a marina owner for the drawdown of water from a flood control reservoir, *Spillway Marina, Inc. v. United States,* 445 F.2d 876 (10th Cir. 1971), or for damages for following its contract specifications (density to which earth backfills must be compacted) where subsequent flooding damaged property. *Irzyk v. United States,* 412 F.2d 749 (10th Cir. 1969).

We thus hold that the Bureau's decision to aid and assist the State of Utah in constructing the bridge and approach ways in this case comes within the discretionary exemption of the Tort Claims Act. Accordingly, neither its adoption or implementation of "plans, specifications, or schedules of operations" for the project gave rise to a viable cause of action under the Act.

REVERSED.

NO. 76-1497
WRIGHT v. UNITED STATES

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent.

To me, this is a compelling case for recovery in these tragic circumstances where proof of negligence by the BIA in designing and construction the approach which washed out and the diversionary dike strongly supports Judge Anderson's findings. I cannot agree that he erred in holding that Utah law on independent contractors does not absolve the Goverment of liability. And application of the discretionary function exception to bar recovery for these localized acts of negligence in designing and building the approach road and dike is an unwarranted expansion of the exception, in my judgment.

I turn first to the discretionary function exception because it is jurisdictional in nature. *Smith v. United States,* 546 F.2d 872, 875-76 (10th Cir.).

A

The discretionary function exception

The Federal Tort Claims Act makes two separate exceptions from the waiver of immunity granted by the statute. 28 U.S.C. §2680(a) first provides an exception as to any claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid. . . ." Second, an exception is granted as to any claim ". . . based upon the exercise or performance or the failure to exercise o[r] perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not

the discretion involved be abused." *Dalehite v. United States,* 346 U.S. 15, 32-33.

The majority opinion holds that both exceptions of § 2680(a) apply here. First, the opinion says that the actions of the BIA in aiding Utah in the construction of the bridge and approach roads was clearly carried out "in the execution of a statute," citing 23 U.S.C. §208 which provides for use of funds to pay for construction and improvement of Indian reservation roads. I cannot agree that this first exception of §2680(a) applies. This exception "deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars tests by tort action of the legality of statutes and regulations." *Dalehite, supra* at 33. This is not such a case because no challenge to 23 U.S.C. §208 or any regulation is involved. Nor is this a case like *Powell v. United States,* 233 F.2d 851 (10th Cir.), challenging Governmental acts in issuing permits, allegedly to the wrong party, but which were acts done in furtherance of applicable statutes and an applicable regulation. As discussed below, I am convinced that the findings of negligence in this case should stand, and the first exception of §2680(a) cannot apply since the Government agents were not "exercising due care" in the enforcement of federal law. *Hatahley v. United States,* 351 U.S. 173, 181.

The principal discussion of §2680(a) by the majority opinion focuses on the second part of the section dealing with the exercise of discretionary function or duty. The opinion says that the exception covers determinations made by executives or administrators in establishing plans, specifications or schedules of operations, and that under the standards applied in *Dalehite* and other cases, the BIA was engaged in exercising a discretionary function in its activities in question so that the Government is immune from suit. I must disagree.

If the majority's expansive interpretation is made of the exception and the *Dalehite* references to "plans, specifications or schedules of operations," then it is hard to imagine an independent similar act by an engineer or other Government employee which would not be immunized from the possibility of relief under the Act. See *Griffin v. United States*, 500 F.2d 1059, 1963-64 (3d Cir.); *Smith v. United States*, 546 F.2d 872, 877 (10th Cir.). In my opinion, this is contrary to the intent of the statute, the *Dalehite* case, and numerous well-reasoned decisions. It is true that *Dalehite* says that more than the initiation of programs comes within the exception and that it includes "determinations made by executives or administrators in establishing plans, specifications or schedules of operations." However, the opinion is clear in stating that it is "[w]here there is room for policy judgment and decision [that] there is discretion. It necessarily follows that acts of subordinates in carrying out operations of government in accordance with official directions cannot be actionable." Id. at 36.

Thus, for the exception to apply the acts in question must be steps directed by a planning-level *policy* decision. See *Seaboard Coast Line R.R. v. United States*, 473 F.2d 714, 716 (5th Cir.); *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir.); compare *Boyce v. United States*, 93 F. Supp. 866, 868-69 (S.D. Iowa). Under the *Dalehite* test it is only those plans which involve such policy considerations that are protected by the exception, *Dalehite*, supra at 35-36, and the "plans" involved here wer not shown to have been of that type in any sense.

The burden was on the Government to establish such elements of the exception. *Boyce v. United States, supra*, 93 F. Supp. at 868. There was no showing of any weighing of considerations like those recognized in *Dalehite* as typically involved in policy judgments — the feasibility of a

program balanced against present knowledge of the effect of procedures proposed, costs and delays against alternative safety measures, and the like. *Dalehite, supra* at 40-41. Absent such considerations, the Act intends the Government to be held accountable under the standard it adopted—that of liability of a private person to compensate victims of negligence. *Indian Towing Co. v. United States*, 350 U.S. 61, 68.

Furthermore, the Government did not demonstrate that any planning-level policy decision dictated the design and construction of the approach road and dike, the omission of riprap, or the use of loose materials in the approach and dike.[1] The exception was applied in *Dalehite* because the Court concluded that "[e]ach of these acts looked upon as negligence was directed by this Plan." Id. at 39. Unlike *Dalehite*, the decision to build the diversionary dike was made on the site by the BIA engineer who supervised the actual construction, and was not directed by any "plan."[2]

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[1]Applying similar reasoning, in *Bryant v. United States*, ...F.2d..... (10th Cir., 11-11-77), we recently held that a decision not to have supervisory personnel outside on grounds of BIA schools was not caused by a policy to relax rigid militaristic practices. The failure to properly carry out outdoor supervisory duties was therefore not within the discretionary function exception.

[2]The record in no way establishes that a federal planning-level policy decision was handed down which directed doing the acts looked upon as negligence. *Dalehite*, supra at 36, 39. Mr. Gillam, a BIA engineer, served as the supervising contractor and contract inspector on the project. On such "force account projects," the resident engineer is given quite a bit of leeway. (Id. at 689, 701-02, 708, 710, 733-34, 751).

A brief history of the planning of the bridge also indicates an absence of policy judgment. Mr. Sargent, the chief structural engineer for the Utah Highway Department at the time, testified that the State of Utah completed plans and specifications for only the bridge proper, but not the approaches other than an oil surface. He said the Utah plans for the approach road were incomplete when turned over to the BIA. (Id. at 611-12). As noted below, the final BIA plans were later submitted to an engineer of the Utah Highway Department for his approval. (Id. at 634-35).

These plans included no item for riprap. (R. V 850). Mr. Gillam said the plans indicated that "fill" was to be used in construction of the approach

Moreover, the broad interpretation of the discretionary function exception made by the majority runs counter to numerous well-reasoned decisions. We have held that failure to erect safety devices or warning signs near a dangerous thermal pool does not come within the exception. *Smith v. United States, supra,* 546 F.2d at 876-77. Failure to provide guard rails on a bridge crossing an irrigation ditch or a fence by the ditch was held not to be an exempt discretionary function. *Foster v. United States,* 183 F. Supp. 524, 527-28 (D.N.M.), affirmed on other grounds, 280 F.2d 431 (10th Cir.). Where decisions not to install appropriate warning devices, barriers, speed control devices or cross walks for the protection of pedestrians at an Air Force base were not shown to have been made at a planning level, summary judgment based on the exception was reversed. *Driscoll v. United States, supra* at 138. And Government construction of a drainage ditch casting an unnatural concentration of water and mud on railroad property was also held not to be a discretionary policy-making function, but an operational one which the Government was obligated to perform in a non-negligent manner. *Seaboard Coast Line R.R. v. United States, supra,* 473, F.2d at 716[3].

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embankment, that the specifications for the fill were to be determined under FP-61, but that he had discretion in choosing where the fill material was to be obtained.

The diversionary dike was added to attempt to direct the flow of water, which might rise out of the regular channel onto the broader flood plain, back under the bridge. However, the trial court found that the dike focused the high water flow channel against the end of the approach road and that the dike was poorly designed and constructed of loosely defined materials. (Findings of Fact 7 and 8, R VIII 3).

[3]I cannot agree that *Spillway Marina v. United States,* 445 F.2d 876 (10th Cir.), or *Irzyk v. United States,* 412 F.2d 749 (10th Cir.) support the conclusions of the majority opinion. The *Spillway Marina* case involved property damage resulting from a drawndown of a reservoir. We held that the attainment of objectives of flood control and navigation required discretionary decisions on the storage and release of water and thus the manner of their exercise was within the exception, including failure to warn. No such policy objectives are shown to be involved here.

Irzyk involved property damages from flooding after seepage from a canal which was built by a subcontractor under a Government contract. However, the attack was on general contract provisions and specifications for all earthwork, which were held to be a discretionary function; there was no claim of negligence at the local operational level. See 412 F.2d at 751. The cases are thus both unlike our case which challenges specific engineering acts at this approach and dike.

The *Seabord* case is of special importance not only because it involved negligent design by the Government, but also because of express approval of its holding by our court. In *Jackson v. Kelly,* 557 F2d. 735 (10th Cir.), our recent, unanimous en banc opinion stated (id. at 738):

> For example, negligence in the construction of a government facility is nondiscretionary and subjects the government to liability under the FTCA. See Seabord Coast Line R.R. v. United States, 5 Cir., 473 F. 2d 714.

We are reminded that "[t] the Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Co.,* 340 U.S. 543, 547. In interpreting the exceptions to the generality of the grant of immunity, the courts include only those circumstances within the words and reason of the exception. *Dalehite, supra,* 346 U.S. at 31 & n.24; *First National Bank in Albuquerque v. United States,* 552 F2d. 370, 376 (10th Cir.), cert. denied, ... U.S. ..... To apply the exception as broadly as the majority opinion does here is to allow the exception to swallow up the Act.

Therefore, I must dissent and would affirm the trial judge's conclusion that the discretionary function exception does not apply.

B

The independent contractor defense

The Government relies heavily on the argument that it was in a position analogous to that of an independent

contractor, that the project was accepted by the State and subsequently maintained by it, and that the *Leininger* Utah opinion frees it of liability in these circumstances. (Brief for the Appellants, 23-26). The majority opinion agrees, stating that under *Leininger* the Government cannot be held liable.

First, the facts of the *Leininger* case and its limited holding are crucial. There an employee of Texas Zinc Minerals Corporation sought damages for injuries sustained during his work from the explosion of an exhaust fan he was dismantling. He sued Stearns-Roger Mfg. Co., a general contractor which built the plant and installed the fan almost four years earlier. Summary judgment for Stearns-Roger was affirmed, the Utah Court pointing out that Texas Zinc had contracted for the construction of the plant by Stearns-Roger as a general contractor, that the contract contemplated that Texas Zinc would specify certain equipment items and Texas Zinc did specify the fans in question, and that the contract stipulated that Stearns-Roger would have no responsibility for the adequacy of properly installed major items of equipment which were selected by Texas Zinc. The Utah Court concluded that the rule of non-liability of independent contractors applied. Among other things the court emphasized (id. at 36) that:

> . . . The defendant contractor, in the instant case, was a mere vehicle, a conduit through which the Durco fans passed; *it did not design, sell or recommend the installation of such fans, and had no discretion in their selection; there was no claim of any act of negligence on defendant's part in the placement of the fans in the laboratory of Texas-Zinc pursuant to specifications;* . . . (Emphasis added).

Finally, we note that the Utah Court stressed the fact that the fans were not the product of the defendant Stearns-Roger's work and that when they were placed no one was

aware of any hazard incident to their intended use. Id. at 38.

Our case is wholly different, in my opinion. We must remember that it was not the bridge but the approach road which washed out and caused this tragedy. The Government flatly admits that the State plans covered only the bridge itself and not the approach roads, that the approaches to the bridge were designed by the BIA, these plans however being later submitted to and approved by the State. (Brief of the Appellants, 5). The Government negligence found by the trial judge was dereliction when the BIA itself designed and built the approach road and diversionary dike. (Findings of Fact 4, 5 and 8, R.VIII, 160-61).[4] Our case is thus unlike *Leininger* where the contractor Stearns-Roger did not design or choose the fans and was not even alleged to have been negligent in the placement of them. See 404 P.2d at 36. And in our case there is no contract provision freeing the Government from liability as a contractor, which was stipulated in the *Leininger* contract. Id. at 35. In fact, on this "force account" project there was *no* contract entered into by the BIA.

In view of these sharp contrasts it is understandable that the trial court held that the *Leininger* rule was inapplicable in our case, and I fully agree. Since the BIA itself did the designing and building of the approach road and the diversionary works, and since these functions were found to have been negligently performed, the reason for nonliability under the independent contractor rule and the *Leininger* case does not exist *L. H. Bell & Associates, Inc. v. Granger,* 543 P.2d 428, 433-34 (Ariz.); see also *Baker v. Fryar,* 421 P.2d 784, 786-87 (N.M.); *Wright v. Creative Corp.,* 498 P.2d 1179, 1181-82 Colo. Ct. App.); *Totten v. Gruzen,* 245 A.2d 1, 5 (N.J.).

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[4]See Part C, infra.

L. H. Bell & Associates, Inc. v. Granger, supra, is of special significance because of its striking similarities to our case.[5] Recovery was sought there for property damages due to negligence of the defendant in planning and designing approaches to a bridge without proper culverts and dikes. It was argued that the plans were accepted by the county so that the defendant was relieved of liability. The Arizona Court said that its general rule of non-liability of the contractor where work was completed and accepted did not apply; that the rule applies only where the contractor has no discretion and merely follows the plans and specifications provided by the employer; and that the fact of approval of the plans by the county did not relieve the designer, Bell, of liability for the inadequate approaches which caused the damages. 543 P.2d at 433-34. This same reasoning applies here.

This very question of the applicability of the rule of non-liability of independent contractors and the *Leininger* case was argued at length to Judge Anderson on essentially the same contentions presented to us. (R. VII, 1128-35). The trial judge rejected the argument that the non-liability rule applies. (Id. at 1135). Then later in his written conclusions of law the court held that "the State of Utah's acceptance and maintenance of the highway system did not constitute independent, intervening causes which would break the chain of causation between the negligent acts of defendants' agents and the deaths of the Fellars, and the injuries suffered by their son." (Conclusion of Law No. 3, R. VIII, 164). In so ruling, the Court applied the same reasoning as that of the New Mexico Court in *Baker v. Fryar,* supra, 421 P.2d at 786-87.

In the *Leininger* case, the Utah Court noted that there

[5]This is apparently a case arising out of the same storm occurring about September 4-6, 1970, as the instant case.

are exceptions to the rule of non-liability after acceptance of an independent contractor's work, and the Court stated that each case must be decided on its own facts. 404 P.2d at 36. Here, the trial court made just such a determination on these particular facts. When such a determination is made on the law of his State by a resident federal trial judge, his views are persuasive and are ordinarily accepted. *Sade v. Northern Natural Gas Co.,* 483 F.2d 230, 234 (10th Cir.); *Teague v. Grand River Dam Authority,* 425 F.2d 130, 134 (10th Cir.); *Parsons v. Amerada Hess Corp.,* 422 F.2d 610, 614 (10th Cir.) (a case involving the liability of independent contractors); *Bartch v. United States,* 330 F.2d 466, 467 (10th Cir.) (a decision under the Federal Tort Claims Act.). A similar rule of deference is applied by the Supreme Court. See *Bishop v. Wood,* 426 U.S. 341, 346-47 n. 10; *Propper v. Clark,* 337 U.S. 472, 486-87. We cannot say that the trial judge was clearly wrong in his ruling here, in my opinion.

C

The trial court's findings of negligence by the BIA

The majority opinion also reverses on the ground that the findings of negligence against the Government were clearly erroneous, and I must disagree.

It is important again to focus on how this accident occurred and the particular acts of negligence which the trial court found to have been a proximate cause of the tragedy. It is undisputed that, as the court found, in the darkness the Fellars family "drove their car and trailer off the end of the washed out approach road into the flood . . ." (Finding of Fact 12, R. VIII, 163).[6] Thus it was

[6]Plaintiffs' Exhibit 2n and other exhibits are terribly impressive. They show graphically the gaping hole where the Fellars drove off the approach road in the dark, after its loose materials washed out.

the washing out of the approach road and not a collapse of the bridge which caused the accident.

The court found that at the location of the bridge there was a broad flood plain with two evident stream channels, one used by low water flow and a wider curving channel that was evidently the course of the stream during flood periods; that the bridge was located across the low flow channel. (Findings of Fact 4, 5 and 6, id. at 160-61). The court then found that the Government was negligent and that its acts of negligence "were a proximate cause of the erosion and flood breakthrough of the entire approach road. . . ". (Finding of Fact 11, id. at 163).

The acts of negligence found were essentially that the approaches were made of loose, essentially finely grained material, with a minimal, inconsequential amount of rock, and no protective riprap to prevent erosion; that the construction focused the high water flow channel against the end of the approach road; that some effort was made by a diversionary dike to direct the flow of flood waters under the bridge but "it was poorly designed and constructed of loosely defined materials and had not been adequately maintained, and the diversionary works could not reasonably be expected to direct a flood of any serious proportions, such as this, under the bridge without threatening the security of the bridge approach where the primary force of the flood could be expected to strike." Findings of Fact 6, 7 and 8, R.VIII, 161).

The court further found that a reasonably prudent engineer would have constructed and placed the bridge, approaches and diversionary works so as to bridge the flood channel, or alternatively would have more efficiently shaped and built the diversionary works and substantially strengthened the materials and reinforced the approaches

to avoid the type of breakthrough that happened. (Findings of Fact 9 and 10, id. at 162).

The majority opinion does not actually question any of these specific findings of negligence. Instead, the opinion reason essentially that the ultimate finding of Government negligence[7] is wrong and that the Government is absolved of liability because of other circumstances — (1) that the State of Utah designed the *bridge* and determined its location; (2) that the bridge design was based on a 25-year design frequency, which was all the State could justify spending funds for; (3) that the BIA was not negligent in designing the approach roads since the bridge design required that the approach roads be placed in the flood channel; and (4) that the approach plans were approved by the State and complied with FP-61 federal standards. In my judgment, none of these points can withstand analysis against this record.

As to point (1), regardless of where the State said the bridge would be or the nature of the bridge design, there was no reason why the approach road should not have been adequately designed and constructed with protective riprap and a proper diversionary dike built to protect the vulnerable approach.[8] In fact, the State's selection of the bridge location underlined the necessity of those protective features.

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[7]After making its specific findings of negligence, the trial court found that negligence of agents of the defendants was responsible for the deficiencies enumerated and that said acts of negligence were a proximate cause of the erosion and flood breakthrough of the entire approach road. (Finding of Fact 11, R. VIII, 162-63).

[8]The plaintiffs presented three civil engineers, two with a doctor's degree and one with a master's degree, who testified to the improper direction of the stream flow by the diversionary dike and to the need for riprap in the construction of the approaches and the dike. (R. III, 374-75; R. IV, 416-17; 426-28; 500-505; and 507-12).

The Government presented evidence that rocks were used in the con-

As to point (2) and the 25-year design frequency of the *bridge*, the majority opinion notes that there was conflicting testimony on the frequency with which a storm of these proportions could be expected to recur. This made the reasonableness of preparations for storm possibilities a question of fact. *L. H. Bell & Associates, Inc. v. Granger, supra,* 543 P.2d. at 433. In our case the trial court found that the expert testimony was in conflict with respect to the size of the flood and the scientific ability to reasonably predict the frequency of its recurrence; that the physical evidences were such as to serve notice that floods of significant proportions had occurred before; that the main channel of such floods was plainly visible; and that a prudent engineer would have been on reasonable notice of the prospect of a flood of the character in question as a defense. And, again, we must remember it was the approach and not the bridge which washed out.[9]

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struction of the dike and the approaches. Generally, the Government's witness stated that most of the rocks were about 12 to 18 inches in size. (R. V. 686, 717, 774; 756, 761; 818). One Government witness testified the rocks were up to two feet in size and two said up to 3 or 4 feet in size. (id. at 699, 717; 805). One Government witness testified that there were only "six or eight" three to four foot boulders (Id. at 850). One Government witness on cross-examination stated that the rocks over 18 inches were not placed so as to protect the embankment against the flowing water, but were merely bulldozed into the road fill in order to "take them off the right-of-way." (Id. at 765). Another Government witness testified there was no effort to "tie" the boulders in the form of riprap. (Id. at 850).

The plaintiffs presented ample evidence to support the trial judge's finding that materials used were inadequate. Six witnesses testified for the plaintiff that the approach road embankment and dike were loosely packed and that they did not observe any rocks over 12 inches in either the embankment of the approach road or the diversionary dike. (R. I, 13, 15, 22, 60-61, 62, 68, 73, 80; R. II, 118, 124; 145; R. III, 235; 264-65, 278). The plaintiffs' witnesses also testified that the diversionary dike was washed away by the first "high flow" of the stream within three months after the project was completed. (R. I, 17, 87, 93; R. II, 118-119, 151; R. III, 234). One of the Government's witnesses did state that he observed the dike was in place in 1969. (R. V, 801-804).

[9]Actually, there was testimony by a Government engineer that the approach was designated to wash out before the bridge. (R. V. 706). And it is clear that the bridge itself was still standing after the accident occurred. (See Plaintiffs' Exhibits 10c through 10m).

The claim of lack of State funds for more adequate designing is not persuasive[10], and in any event the part taken by the State in the project does not absolve the Government of its liability for concurrent negligence by its acts which were found to be "a proximate cause" of the washout of the approach. Under Utah law separate acts of negligence which do not occur simultaneously can both be proximate causes of an accident so long as the second act is not a supervening cause. *Jacques v. Farrimond,* 380 P.2d 133, 134 (Utah); *Toma v. Utah Power & Light Co.,* 365 P.2d 788, 794-95 (Utah); *Hillyard v. Utah By-Products Co.,* 263 P.2d 287, 289-90 (Utah).[11]

As to point (3), the fact of state approval of the plans for the approach in no way relieves the Government of liability for its negligence in preparing the design and constructing the faulty approach road and diversionary dike. *L. H. Bell & Associates, Inc. v. Granger, supra,* 543 P.2d.

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[10]A witness for the plaintiff estimated that cost of installing riprip in the approach road embankment would have been "approximately $10,000." (R. IV, 417).

[11]Insofar as the designation of the bridge location by Utah is concerned, that step could not be a "supervening cause" since it obviously preceded the designing and construction of the approach road and diversionary dike by the Government. Furthermore, the subsequent State acts cannot be said to be a supervening cause, freeing the Government of liability. After enumerating the BIA deficiencies in designing and constructing the approach road and diversionary dike the trial judge found (Finding of Fact II, R. VIII, 163):

> That said deficiencies were intergrated into the construction in such a way that the subsequent acceptance and maintenance of the bridge and approach road by the State of Utah did not break the chain of causation between the negligent acts and the erosion and breakthrough.

Where state law would impose liability on two parties as joint tort feasors, the Government may be held jointly and severally liable for its concurrent negligence. E.g., *H. L. Properties, Inc. v. Aerojet-General Corp., et al,* 321 F.Supp. 1006, 1009-1010 (S.D. Fla.), affirmed per curiam, 468 F.2d 1397.

at 433. In fact, neither federal nor state "approval" sets the standard of care or insulates the Government from liability for negligence in designing and building the approach road and dike.

As to point (4), the Government argues that all the BIA construction "comported with the applicable federal specification requirements, namely FP-61."[12] (Brief for the Appellants, 5), citing some testimony touching on compaction tests and the slopes of the approach roads, but not dealing with the central problems of the use of loose, fine materials and the absence of riprap. Moreover, the argument is not responsive to the finding that the manner of constructions focused the high water flow channel against the end of the approach road. (Finding of Fact 7, R. VIII, 161).

In any event, the trial court found that loose material was used on the approach road with a minimal amount of rock and that there was no protective riprap to prevent erosion. He also found that loose material was used in the diversionary dike. (Findings of Fact 6 and 8, R. VIII, 161). These findings are clearly supported by the record, see note 5 supra, and thus the claim of compliance with FP-61 standards as they are stated is wholly untenable. (See FP-61, Sec. 510, "Loose Riprap", pp. 334-35, specifying requirements for riprap content in terms of amount of given sizes of rock to be used, among other things.)

In sum, to me the specific findings of negligence by the trial court are strongly supported by the record. Re-

[12]The Government has not demonstrated the weight that should be given to the federal "Standard Specifications" in this case where the general measure of liability is supplied by state law. See 28 U.S.C. §1346(b); *Rayonier, Inc. v. United States*, 352 U.S. 315, 318. The trial judge used as a standard that of a "prudent engineer" and a "reasonably prudent engineer," see Findings of Fact 9 and 10, R. VIII, 162, and this appears to be a proper standard.

jection of them by the majority's process of generalization, and without demonstrating that any of the findings is clearly erroneous, is wholly unwarranted in my opinion. I am firmly convinced that the trial judge was on solid ground in awarding recovery for this tragedy under the Tort Claims Act — relief which was clearly intended by Congress in enacting this remedial statute. I cannot agree to set the judgment aside.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

FINDINGS OF FACT AND CONCLUSION OF LAW
C 22-73

ALVIN H. WRIGHT and MARTHA WRIGHT, General Guardians and Guardians ad Litem of PAMELA JAN FELLARS, RICHARD LELAND FELLARS, NANCY KAY FELLARS and MARCUS DEWEY FELLARS, minors, and ALVIN H. WRIGHT, Executor of the Estates of RICHARD DEWEY FELLARS and NANCY JANE BARLOW FELLARS,

Plaintiffs,

v.

UNITED STATES OF AMERICA and the UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, an agency of the UNITED STATES OF AMERICA,

Defendants.

The above-entitled matter came on for trial before the court, sitting without a jury, on the 5th day of December, 1975. William S. Andrews and C. Richard Henriksen, attorneys, appeared for the plaintiffs, and Michael M. Hunter represented the defendants. Witnesses were sworn and testified for each party, exhibits were admitted and examined, and counsel presented their arguments. The court deems itself fully advised and makes the following finds of fact and conclusions of law.

FINDINGS OF FACT

1. The court finds it has jurisdiction based upon Section 1346(b) of Title 28 of the United States Code (28 U.S.C. 1346(b)). This has not been disputed by the parties.

2. The factual transaction out of which the cause sued upon arose occurred in San Juan County, State of Utah, and venue for the trial of this case is therefore properly in the Central Division of the District of Utah.

3. That on September 5, 1970, the date of the flood and accident giving rise to the claims of plaintiffs in this case, State Highway No. 262 was located in San Juan County and extended from the town of Aneth across McElmo Creek over a bridge extending on a road toward Montezuma Creek.

4. That the approaches to the bridge and the bridge itself were negligently designed and constructed to coordinate with the highway traffic system in that area, without adequate or reasonable concern for the hazards that would be created during floods.

5. That the stream bed of McElmo Creek at the place of the location of the bridge at the time of its construction was in a broad flood plain, with two evident stream channels. One was used by low water flow and a wider curving channel, sweeping broadly into a flood plain that was evidently the course of the stream during flood periods.

6. That the bridge was located across the low flow channel. The approaches were made of loose, essentially finely grained material, with a minimal, inconsequential amount of rock, and no protective ramparts or "riprap" to prevent erosion by flood materials.

7. That the manner of construction above referred to focused the high water flow channel against the end of the approach road adjoining the Montezuma Creek side of the bridge.

8. That the testimony establishes some effort was made to provide a diversionary works to direct the flow of the flood waters under the bridge. The court finds, however, that it was poorly designed and constructed of loosely defined materials and had not been adequately maintained; that it could not reasonably be expected to divert a flood of any serious proportions, such as the one in question, under the bridge without threatening the security of the bridge approach where the primary force of the flood could be expected to strike.

9. That on September 4, 1970, and continuing through September 5, 1970, a heavy rain storm caused a severe flood in the McElmo Creek drainage basin; that the storm was of record proportions, based upon the scientific measurements made of the same; that it washed out the entire approach road at the Montezuma Creek side of the McElmo Creek bridge, although the bridge itself was more than adequate to handle the flood. That notwithstanding its size, the court finds that flood was one that was contained within the flood plain of McElmo Creek as it theretofore existed. That at the time of the construction of the bridge physical evidences were such as to serve notice that floods of significant proportions had occurred before, and the main channel of such floods was plainly visible. That a prudent engineer in constructing the bridge and approaches, with the related diversionary works, would have been on reasonable notice of the prospect of a flood of the character of the one in question.

10. That the expert testimony was in conflict with respect to the size of the flood and the scientific ability to reasonably predict the frequency of its recurrence. Nevertheless, the court finds the substantial and reliable expert testimony established that the reasonably prudent engineer, in considering the location of the bridge and

the requirements for the construction of its approaches, would have responded to the physical evidences of the flood dangers to be expected and not placed the bridge over the low flow channel. That he would have constructed and placed the bridge, the approaches and diversionary works so as to bridge the flood channel or, as an alternative, would have more efficiently shaped and built the diversionary works and substantially strengthened the materials and reinforced the approaches to avoid the type of breakthrough that happened.

11. That it was negligence of the agents of the defendants, in performance of their duties for defendants that was responsible for the deficiencies that are above enumerated, for which defendants are responsible; that said acts of negligence were a proximate cause of the erosion and flood breakthrough of the entire approach road as above described. That said deficiencies were integrated into the construction in such a way that the subsequent acceptance and maintenance of the bridge and approach road by the State of Utah did not break the chain of causation between the negligent acts and the erosion and breakthrough.

12. That because of said breakthrough the deceased, Richard Dewey Fellars and Jane Barlow Fellars, and their son, Marcus Dewey Fellars, in the darkness of the night of September 5, 1970, drove their car and trailer off the end of the washed-out approach road into the flood; that Richard and Jane Barlow Fellars were killed; that Marcus suffered bruises to his leg and body, shock and cuts.

13. That there is no credible evidence to show that said deceased persons, or the injured Marcus Dewey Fellars, were negligent in any respect that could have proximately caused injury or death.

14. That as a result of the deaths of Richard Dewey Fellars and his wife, Jane Barlow Fellars, the plaintiffs incurred necessary funeral expenses totaling $4,900, and incurred losses in personal property of $3,000; that the plaintiff, Marcus Dewey Fellars, suffered damages for his personal injuries in the sum of $2,500.

15. In addition, the plaintiffs have been damaged in the loss of the love, association, companionship, society, care, loss of inheritance and support of their natural parents in the sums indicated below:

Pamela Jane Fellars Cannon	$50,000.
Richard Leland Fellars	55,000.
Nancy Kay Fellars Overman	55,000.
Marcus Dewey Fellars	60,000.

16. That the plaintiff Pamela Fellars Cannon, since the death of her parents, has suffered from a serious health condition, ulcerated colitis. The court finds, however, that the plaintiff Pamela Fellars Cannon has failed to establish by a preponderance of the evidence that such condition was foreseeable, or could be said to have been proximately caused by the accident causing the deaths of her parents.

CONCLUSIONS OF LAW

1. That the defendant, through its agents and employees, had the discretion to determine whether to build the bridge, approaches, and diversionary works in question, but that where the bridge was placed and how they were to be constructed were actions which they were chargeable with performing in a non-negligent manner and without causing injury to plaintiffs or others using the highway in question.

2. The court concludes that the defendants breached their duties owed to plaintiffs under these circumstances, proximately causing damages to plaintiffs.

3. The court concludes that the State of Utah's acceptance and maintenance of the highway system, of which the bridge was a part, did not constitute independent, intervening causes which would break the chain of causation between the negligent acts of defendants' agents and the deaths of the Fellars, and the injuries suffered by their son.

4. The court concludes as a matter of law there was no contributory negligence or assumption of risk on the part of the deceased persons, or Marcus Dewey Fellars, that would bar recovery.

5. The court concludes a judgment should be entered in favor of plaintiffs with damages awarded as follows:

Funeral Expenses	$4,900.
Loss of personal property	$3,000.
Personal Injuries to Marcus Dewey Fellars	$2,500.
Loss of Society, etc.:	
Pamela Jane Fellars Cannon	$50,000.
Richard Leland Fellars	$55,000.
Nancy Kay Fellars Overman	$55,000.
Marcus Dewey Fellars	$60,000.

and for costs of this action.

DATED this 18th day of February, 1976.

ALDON J. ANDERSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ORDER DENYING MOTION TO AMEND THE JUDGMENT OR FOR NEW TRIAL
C 22-73

ALVIN H. WRIGHT, et al,
Plaintiffs,

v.

UNITED STATES OF AMERICA and the UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, an agency of the UNITED STATES OF AMERICA,
Defendants.

Judgment was entered in the above-entitled action on February 23, 1976, following a trial before the court. On March 2, 1976, plaintiffs filed a motion to alter or amend the judgment or for a new trial and to amend the findings and conclusions. The court found for the plaintiffs and determined the damages they had sustained only after careful and lengthy deliberation of the evidences presented at trial, including evidence of the plaintiffs' loss of inheritance. Similarly, the court's decision concerning the damages which Pamela Fellars Cannon was entitled to recover was carefully considered. Wherefore,

IT IS HEREBY ORDERED that plaintiffs' motion to amend or alter the judgment or for a new trial is denied.

DATED this 22nd day of March, 1976.

ALDON J. ANDERSON
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C-22-73
NOTICE OF APPEAL

ALVIN H. WRIGHT and MARTHA WRIGHT, General Guardians and Guardians ad Litem of PAMELA JAN FELLARS, RICHARD LELAND FELLARS, NANCY KAY FELLARS and MARCUS DEWEY FELLARS, minors, and ALVIN H. WRIGHT, Executor of the Estates of RICHARD DEWEY FELLARS and NANCY JANE BARLOW FELLARS, *Plaintiffs,*

v.

UNITED STATES OF AMERICA and the UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, an agency of the UNITED STATES OF AMERICA, *Defendants.*

Notice is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Court's order granting judgment and awarding damages in favor of the plaintiffs.

RAMON M. CHILD
United States Attorney
By BRENT WARD
Asst. United States Attorney

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Notices of Appeal to C. R. Henriksen and D. Clayton Fairbourn, 320 South Fifth East, Salt Lake City, Utah 84102, and William S. Andrews, 1432 North 7th Street, Phoenix, Arizona 85006, attorneys for plaintiffs, postage prepaid, this 2nd day of March, 1976.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil Action File No. C 22-73
JUDGMENT

Alvin H. Wright and Martha Wright, General Guardians ad Litem of Pamela Jane Fellars, Richard Leland Fellars, Richard Leland Fellars, et al.

vs.

United States of America and the United States Dept. of Interior, Bureau of Indian Affairs, an Agency of the United States of America.

This action came on for trial (hearing) before the Court, Honorable ALDON J. ANDERSON, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged THAT JUDGMENT BE ENTERED IN FAVOR OF PLAINTIFFS WITH DAMAGES AWARDED AS FOLLOWS:

Funeral Expenses	$4,900.
Loss of personal property	3,000.
Personal Injuries to Marcus Dewey Fellars	2,500.
Loss of Society, etc.:	
Pamela Jane Fellars Cannon	50,000.
Richard Leland Fellars	55,000.
Nancy Kay Fellars Overman	55,000.
Marcus Dewey Fellars	60,000.

AND FOR COSTS OF THIS ACTION.

Dated at Salt Lake City, Utah, this 19th day of February, 1976.

VERL C. RITCHIE
Clerk of Court